Sprint

September 4, 2001

Mr. Alex Starr, Esq.
Chief, Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 Twelfth Street SW
Washington D.C. 20554

VIA FAX: (202) 418-7223

Re: @Communications, Inc. Request For Inclusion of Complaint, Once Filed, on Accelerated Docket ("the Request")

Dear Mr. Starr,

In accordance with the letter dated August 20, 2001 from Lisa Griffin, Assistant Chief of the Market Disputes Resolution Division, this letter provides a written response on behalf of Carolina Telephone & Telegraph and Central Telephone Company (collectively, "Sprint") to the Request submitted by @Communications, Inc. ("@Comm"). For the reasons set forth below, @Comm's Request should be denied.[1]

I. @Comm's Request Does Not Meet the Commission's Requirements for Inclusion in the Accelerated Docket.

As the Enforcement Bureau clearly understands,[2] @Comm's complaint raises one issue: Who should pay for transport to a point of interconnection ("POI") that is outside the ILEC's local exchange boundary? @Comm's complaint should not be included in the Accelerated Docket, because the complaint does not satisfy the factors for admission set forth in Rule 1.730(e). Specifically, @Comm's Request fails to comply with 1.730(e)(3), because the issue in the Request is not suited for decision under the constraints of the Accelerated Docket, and fails to comply with 1.730(e)(2), because it cannot be determined that expedited resolution is likely to advance telecommunications competition. Further, the Request fails to comply with 1.730(e)(4) to the extent that @Comm's contract claim does not state a claim for violation of the Act,[3] Commission rule or order falling within the Commission's jurisdiction.

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[1] Factors to be considered in deciding whether to admit a proceeding onto the Accelerated Docket are set forth in 47 CFR §1.730(e).

[2] See August 20, 2001 letter from Lisa Griffin, Assistant Chief of the Market Disputes Resolution Division, to Leon Kestenbaum, Sprint Vice President, Federal Regulatory Affairs (Ret.).

[3] "Act" refers to the Communications Act of 1934, as amended.

A. The Issue in the Request is Not Suited For Decision Under the Constraints of the Accelerated Docket.

Because the issue raised in the Request is the subject of an ongoing Commission rulemaking, it is inappropriate to determine this issue in a complaint proceeding, much less in the Accelerated Docket. This issue has been hotly debated in numerous states. ILECs have argued that their obligation to transport a local call originating on their network without compensation ends at the local exchange boundary. CLECs maintain that ILECs may not assess any charges for delivering ILEC-originated traffic to a POI established anywhere in the LATA. State commissions have arrived at differing decisions on this issue. For example, commissions in New York and Wisconsin have generally agreed with the CLECs' position.[4] Florida and Georgia deferred decisions in two-party dockets and referred the issue to a generic proceeding in order to receive broader input. South Carolina has sided with the ILECs on this issue,[5] and as @Comm has acknowledged, the North Carolina Utilities Commission ("NCUC") has twice issued rulings in favor of the ILEC position.[6]

There have been clear indications that the Commission should end this debate by issuing a ruling that applies across the nation.[7] On April 27, 2001, the Commission

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[4] Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc., New York Public Service Comm'n Case 01-C-0095, *Order Resolving Arbitration Issues*, (issued July 30, 2001) at 28; Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), Public Service Comm'n of Wisconsin No. 05-MA-120, (issued October 12, 2000) at 37-38.

[5] Petition of AT&T Communications of the Southern States, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to 47 USC Section 252, South Carolina PSC Docket No. 2000-527C, Order No. 2001-079 (issued January 30, 2001).

[6] Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996, NCUC Docket No. P-140, Sub 73, P-646, Sub 7, *Recommended Arbitration Order*, (issued March 9, 2001) ("AT&T NC Arbitration Order") at 5-11; Petition of Sprint Communications Company L.P. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. P-294, Sub 23, *Recommended Arbitration Order* (Issued July 5, 2001) ("Sprint NC Arbitration Order") at 19-23

[7] The NCUC suggested both to AT&T and Sprint Communications Co. L.P. that they may wish to seek a declaratory ruling from the Commission. AT&T NC Arbitration Order at 11; Sprint NC Arbitration at 23. The NCUC ordered @Comm's complaint against Sprint held in abeyance pursuant to @Comm's request "while it (@Comm) initiates a proceeding with the…FCC…seeking a declaratory ruling on the cost of transport issue." @Communications, Inc. v. Carolina Telephone and Telegraph Co. and

released a Notice of Proposed Rulemaking (the "*NPRM*") which, *inter alia*, squarely addressed this issue.[8] In paragraph 112 of the *NPRM,* the Commission had a clear opportunity to clarify the current state of the law regarding who bears the cost of transporting a local call to a POI outside the local calling area. Instead of resolving the controversy, the Commission chose to simply acknowledge the debate and frame the issue, effectively deferring a final decision until after comments are received.[9] Specifically, in paragraph 112, the Commission cited current reciprocal compensation rules, including 51.701(c)-(e) and 51.703(b). The Commission then stated:

> "Application of these rules has led to questions concerning which carrier should bear the cost of transport to the POI, and under what circumstances an interconnecting carrier should be able to recover from the other carrier the costs of transport from the POI to the switch serving its end user. In particular, carriers have raised the question whether a CLEC, establishing a single POI within a LATA, should pay the ILEC transport costs to compensate the ILEC for the greater transport burden it bears in carrying the traffic outside a particular local calling area to the distant single POI. Some ILECs will interconnect at any POI within a local calling area; however, if a CLEC wishes to interconnect outside the local calling area, some LECs take the position that the CLEC must bear all costs for transport outside the local calling area. CLECs hold the contrary view, that our rules simply require LECs to interconnect at any technically feasible point within a LATA, and that each carrier must bear its own transport costs on its side of the POI."

The Commission then requested comments regarding how to resolve the issue, asking:

> "If a carrier establishes a single POI in a LATA, should the ILEC be obligated to interconnect there and thus bear its own transport costs up to the single POI when the single POI is located outside the local calling area? Alternatively, should a carrier be required either to interconnect in every local calling area, or to pay the ILEC transport and/or access charges if the location of the single POI requires the ILEC to transport a call outside the local calling area?..."[10]

Central Telephone Co., Docket Nos. P-7, Sub 969 and P-10, Sub 611, *Order Holding Dockets in Abeyance,* (issued July 19, 2001) (the "Abeyance Order"). Finally, the Commission itself invited parties to file a petition for declaratory ruling or petition for rulemaking with the Commission. In the Matter of Joint Application by SBC Communications, Inc. *et al.* for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, *Memorandum Opinion and Order*, FCC 01-29 (rel. January 22, 2001) at ¶234.

[8] In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking* (rel. April 27, 2001) at ¶¶112-114.

[9] In addition, the Commission could have, on its own motion, issued a declaratory ruling to resolve the controversy, as provided in 47 CFR §1.2.

[10] *NPRM* at ¶113.

Based on the foregoing, it is clear that the issue raised by @Comm in its proposed complaint is the exact issue under consideration by the Commission in the *NPRM*. As a result, this matter is not suited for decision under the constraints of the Accelerated Docket, as provided in Commission Rule 1.730(e)(3). This is not a matter for enforcement of the rules between two parties, but is instead an issue requiring industry-wide debate and a policy decision by the Commission.

Because the Commission has yet to clarify the current state of the law on the cost of transport issue, the Enforcement Bureau has nothing to enforce. The full Commission should make the decision on this issue, which should apply to all LECs. Therefore, all LECs should have access to the debate. The *NPRM* provides the precise vehicle to accomplish this task. It would be a waste of time and resources for the Enforcement Bureau to duplicate the efforts commenced in the *NPRM*.[11]

A petition for declaratory ruling would be a valid alternative to the *NPRM*, as suggested by both the NCUC and the Commission. Commission Rule 1.2 provides that the Commission may issue a declaratory ruling to terminate a controversy or remove uncertainty.[12] Both vehicles would provide an opportunity for broad participation in resolving an issue of national scope. In fact, in obtaining the Abeyance Order from the NCUC on the cost of transport issue, @Comm represented to the NCUC that it would be initiating a proceeding with the Commission to seek a declaratory ruling.[13] Rather than honor the Abeyance Order by seeking a declaratory ruling, @Comm has instead not only pursued a complaint, but also seeks inclusion on the Accelerated Docket. Perhaps @Comm realizes that the Commission would not likely entertain a request for declaratory ruling while it is considering the same issue in a rulemaking proceeding. Nevertheless, @Comm is in violation of the spirit, if not the letter, of Abeyance Order, inappropriately attempting to short-circuit a process requiring broad participation by seeking accelerated treatment of a two-party complaint.[14]

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[11] Comments in the *NPRM* were filed on August 21, 2000. Reply Comments are due on October 5.

[12] 47 CFR §1.2

[13] @Communications, Inc. v. Carolina Telephone and Telegraph Co. and Central Telephone Co., Docket Nos. P-7, Sub 969 and P-10, Sub 611, *@Comm's Reply to Answer* (filed July 16, 2001) at 3. @Comm stated "@Communications will request the [NCUC] to hold its Petition in this docket in abeyance and will initiate a proceeding at the FCC seeking a declaratory ruling on the cost of transport issue and the effect of 47 CFR §51.709(b)." See also Footnote 5, *supra.*

[14] The abeyance order entered by NCUC is supported by the need for Commission resolution of this *industry-wide* issue. Allowing @Comm to pursue the issue in a two-party complaint proceeding, rather than through a declaratory ruling or NPRM proceeding, would undermine the rationale for the abeyance order and establish a troubling precedent. The state commission arbitration and federal review scheme established by Congress in Sections 251 and 252 could be easily evaded if parties were indiscriminately permitted to "stay" interconnection agreement disputes at the state commissions and seek resolution of them by the Commission through the two-party complaint process.

B. It Cannot be Demonstrated that Expedited Resolution of the Cost of Transport Issue is Likely to Advance Telecommunications Competition.

@Comm's Request fails to satisfy 1.730(e)(2) because @Comm cannot demonstrate that resolution of the dispute is likely to advance competition in the telecommunications market. The very existence of the *NPRM,* as cited above, is evidence that the Commission is wrestling with the issue of who should pay for out-of-area transport in order to determine the policy that is most likely to advance competition.

This determination should be left to the Commission based on the fully developed record being created in the *NPRM.* Until the Commission makes its determination, the Enforcement Bureau cannot, and should not be expected to, determine the effect of this issue on competition. @Comm, therefore, cannot make the requisite showing that accelerated consideration of this issue by the Enforcement Bureau would be likely to advance competition in the telecommunications market.

C. @Comm's contract claim does not state a claim for violation of the Act, Commission rule or order falling within the Commission's jurisdiction.

A breach of contract claim, by itself, does not constitute a violation of the Act, Commission rule or order, as provided in Rule 1.730(e)(4). As stated in pages 2-4 above, until the Commission makes a determination that resolves the cost of transport issue, Sprint cannot be in violation of the Act, Commission rule or order. In fact, Sprint's position, requiring @Comm to assume the cost of transport to a POI outside the local calling area, precisely adheres to the NCUC's rulings in the AT&T NC Arbitration and the Sprint NC Arbitration. Because Sprint is not in violation of the Act or any Commission rule or order, @Comm is left only with a basic breach of contract claim. @Comm's contract claim is that Sprint's position conflicts with an alleged interconnection agreement provision.[15] Sprint denies that its position conflicts with any applicable interconnection agreement provision. Even if true, the change in law clause would require that the agreement be amended to reflect the law in North Carolina. Regardless, a contract claim, by itself, does not constitute a violation of the Act, Commission rule or order that would justify inclusion of the complaint on the Accelerated Docket.

II. Conclusion.

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[15] @Comm has conceded that its interconnection agreement with Sprint expired on August 16, 2000. The agreement has not been renewed or continued. There is no provision in the agreement for continuation of the agreement post-expiration.

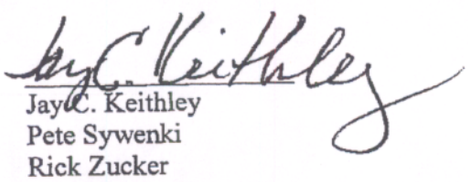
@Comm's complaint should not be included in the Accelerated Docket, because the complaint does not satisfy the factors for admission set forth in Rule 1.730(e). Specifically, @Comm's complaint fails to comply with 1.730(e)(2), (3) and (4).

@Comm's complaint fails to satisfy 1.730(e)(2) because @Comm cannot demonstrate that resolution of the dispute at issue is likely to advance competition in the telecommunications market. The language contained in the *NPRM* serves as proof that the Commission itself is wrestling with the issue of who pays for out-of-area transport in order to determine the policy that is most likely to advance competition.

@Comm's complaint fails to satisfy 1.730(e)(3) because the issue in the complaint is ill suited for decision under the constraints of the Accelerated Docket. The Accelerated Docket involves an expedited decision in a matter generally involving two parties, in this case @Comm and Sprint. However, the cost of transport issue is a national issue, the resolution of which may materially affect numerous CLECs and ILECs. Thus, a decision on this issue requires participation by numerous parties in an expansive forum, such as a rulemaking or a declaratory ruling. The Accelerated Docket is simply not suitable to make such a decision. Finally, @Comm's complaint fails to satisfy 1.730(e)(4), because a contract claim, by itself, does not constitute a violation of the Act, or a Commission rule or order.

In conclusion, deciding who pays for transport to a POI located outside the local calling area is a national issue that requires broad input and a definitive policy decision. The Commission has established an *NPRM* that directly addresses this issue. The decision should be made by the Commission in the *NPRM*, and not by the Enforcement Bureau in a complaint on the Accelerated Docket. @Comm's request for inclusion in the Accelerated Docket should be denied.

Respectfully submitted,



Jay C. Keithley
Pete Sywenki
Rick Zucker
Sprint Corporation
401 9th St NW
Washington, DC 20004
(202-585-1920)

cc: W. Scott McCollough
David Bouldoc
Strumpf Craddock Massey & Pullman

1801 N. Lamar Boulevard
Suite 104
Austin, TX 78701
FAX: (512) 485-7921

Kathryn L. Feeney
Sprint
5454 West 110th Street
Overland Park, KS 66211

Robert Carl Voit
Carolina Telephone and Telegraph Company
Legal Department – Mailstop NCWKFR0313
14111 Capital Boulevard
Wake Fortest, NC 27587-5900

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response to the August 16, 2001 @Communications, Inc. request for Complaint on the FCC's Accelerated Docket against Carolina Telephone and Telegraph Company and Central Telephone Company has been served on the following by facsimile and/or by first class U.S. Mail, on this 4th day of September, 2001.

W. Scott McCollough
David Bouldoc
Strumpf Craddock Massey & Pullman
1801 N. Lamar Boulevard
Suite 104
Austin, TX 78701
FAX: (512) 485-7921

Jay C. Keithley